

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

CECELIA FRUSHER on behalf of	:	
RICHARD FRUSHER (deceased),	:	
Plaintiff,	:	
	:	
v.	:	CA 08-271 ML
	:	
MICHAEL J. ASTRUE,	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	

**REPORT AND RECOMMENDATION**

David L. Martin, United States Magistrate Judge

This matter is before the Court on the request of Plaintiff Cecelia Frusher ("Plaintiff"), on behalf of her husband, Richard Frusher ("Claimant"), now deceased, for judicial review of the decision of the Commissioner of Social Security ("the Commissioner"), denying Disability Insurance Benefits ("DIB"), under §§ 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(g) ("the Act"), and 28 U.S.C. § 1331. Plaintiff has filed a motion to reverse the decision of the Commissioner without, or, alternatively, with a remand for a rehearing. See Plaintiff's Motion for Relief under 42 U.S.C. § 405(g) and/or 28 U.S.C. § 1331 (Document ("Doc.") #9) ("Motion to Reverse"). Defendant Michael J. Astrue ("Defendant") has filed a motion for an order affirming the decision of the Commissioner. See Defendant's Motion for an Order Affirming the Decision of the Commissioner (Doc. #12) ("Motion to Affirm").

This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth herein, I find that the Commissioner's decision is supported by substantial evidence in the record. Accordingly, based on the following analysis, I

recommend that Defendant's Motion to Affirm be granted and that Plaintiff's Motion to Reverse be denied.

### **Facts and Travel**

Claimant was born in 1941. (Record ("R.") at 20, 45, 159) He died of a heart attack in October of 2005, and his widow, Plaintiff, is the properly substituted party. (R. at 20, 24, 158, 212)

Claimant filed prior applications for DIB in 1975 and 1978 (the "prior applications"). (R. at 19-20) The first (the "1975 application") was denied at the initial determination level in a notice dated September 4, 1975 (the "9/4/75 notice"), on technical grounds for lack of insured status.<sup>1</sup> (R. at 19, 35) The second (the "1978 application") was denied in an initial determination dated July 11, 1978 (the "7/11/78 notice"), on medical grounds.<sup>2</sup> (R. at 20, 35, 52) There is no indication in the record of further appeal of those determinations. (R. at 35)

On November 17, 2003, Claimant filed the current application (the "current application") for DIB, alleging disability since December 31, 1974, due to mental illness. (R. at 20, 35, 159-61) The current application was denied initially and on reconsideration, (R. at 53-54, 78-80, 81, 90-92), and a request for a hearing before an Administrative Law Judge ("ALJ") was timely filed, (R. at 35, 57, 82). A hearing was held before ALJ V. Paul McGinn on May 10, 2005 (the "5/10/05 hearing"). (Id.) On June 7, 2005, ALJ McGinn issued a partially favorable decision (the "first decision"), holding that Claimant's psychotic disorder met listing 12.03 since April 1, 1975, the date he was

---

<sup>1</sup> This denial was erroneous with respect to the finding that Claimant did not have insured status at that time. (R. at 19 n.1)

<sup>2</sup> Neither of the prior applications can be located. (R. at 20 n.2)

first insured for DIB.<sup>3</sup> (R. at 20, 35-39, 43) Thereafter, ALJ McGinn, in a June 2005 letter, (R. at 128-29), denied a post-hearing request by Claimant's counsel to reopen the prior applications, (R. at 121, 125-27). Claimant appealed this denial to the Appeals Council, which in a September 16, 2005, order remanded the case to an ALJ to render a decision on Claimant's disability during the period from December 31, 1974, his alleged onset date, through March 31, 1975, because the 5/10/05 hearing tape could not be located.<sup>4</sup> (R. at 20, 41-42)

A supplemental hearing was held on March 30, 2006 (the "3/30/06 hearing"), before ALJ Hugh S. Atkins, (R. at 259), at which Plaintiff appeared and testified, (R. at 259, 263-73). On June 7, 2006, ALJ Atkins issued a decision (the "current decision"), in which he found that Claimant was not disabled before April 1, 1975, as he lacked disability insured status prior to that date. (R. at 24) ALJ Atkins also declined to reopen the prior applications. (*Id.*) Plaintiff requested that the Appeals Council review ALJ Atkins' decision, (R. at 15), but on May 19, 2008, the Appeals Council denied her request, (R. at 8-11), thereby rendering ALJ Atkins' decision the final decision of the Commissioner, (R. at 8). Plaintiff thereafter filed this action for judicial review.

### **Issues**

The issues for determination are whether the decision of ALJ Atkins that Claimant was not disabled prior to April 1, 1975, and whether ALJ Atkins' refusal to reopen Claimant's prior

---

<sup>3</sup> The first decision did not confer benefits from April 1, 1975, because in a DIB claim benefits are payable only up to twelve months prior to the date of the legally effective application. (R. at 20); see also 20 C.F.R. § 404.621 (2009).

<sup>4</sup> The Appeals Council affirmed ALJ McGinn's holding that Claimant was disabled as of April 1, 1975. (R. at 20, 41)

applications are supported by substantial evidence in the record and are legally correct.

### **Jurisdiction**

Ordinarily, a denial of a request to reopen a determination or decision is not reviewable in federal court. See 20 C.F.R. § 404.903 (2009);<sup>5</sup> (R. at 10); see also Califano v. Sanders, 430 U.S. 99, 107-08 (1977); Colon v. Sec'y of Health & Human Servs., 877 F.2d 148, 152 (1<sup>st</sup> Cir. 1989); cf. 42 U.S.C. 405(g) (limiting judicial review to "final decision[s] of the Commissioner of Social Security made after a hearing"). However, an exception to this general rule exists when a claimant presents a colorable constitutional claim. See Califano v. Sanders, 430 U.S. at 109; Dvareckas v. Sec'y of Health & Human Servs., 804 F.2d 770, 771 (1<sup>st</sup> Cir. 1986) ("Absent a constitutional claim, we lack jurisdiction to review the Secretary's refusal to reopen a prior adjudicated claim."). "To be colorable ... the alleged violation need not be substantial, but the claim must have some possible validity." Mehilli v. Gonzales, 433 F.3d 86, 93-94 (1<sup>st</sup> Cir. 2005) (quoting Torres-Aguilar v. INS, 246 F.3d 1267, 1271 (9<sup>th</sup> Cir. 2001) (citation omitted)); see also Boothby v. Soc. Sec. Admin., No. 97-1245, 1997 WL 727535, at \*1 (1<sup>st</sup> Cir. Nov. 18, 1997) (unpublished decision) (noting that inquiry regarding whether

---

<sup>5</sup> Section 404.903 provides, in relevant part, that:

Administrative actions that are not initial determinations may be reviewed by [the Social Security Administration ("SSA")], but they are not subject to the administrative review process provided by this subpart, and they are not subject to judicial review. These actions include, but are not limited to, an action--

....

(1) Denying your request to reopen a determination or a decision ....

20 C.F.R. § 404.903 (2009).

colorable due process claim has been demonstrated "is not an onerous standard") (citing Evans v. Chater, 110 F.3d 1480, 1483 (9<sup>th</sup> Cir. 1997)); accord Udd v. Massanari, 245 F.3d 1096, 1099 (9<sup>th</sup> Cir. 2001) ("A challenge that is not wholly insubstantial, immaterial, or frivolous raises a colorable constitutional claim.") (internal quotation marks omitted). Such instances will be "rare." Califano v. Sanders, 430 U.S. at 109. Defendant concedes that Plaintiff has advanced a colorable constitutional claim in the instant matter. See Defendant's Memorandum of Law in Support of Motion for an Order Affirming the Decision of the Commissioner ("Defendant's Mem.") at 5 ("Plaintiff advances such a claim here - arguing that because his mental impairments prevented him from understanding and pursuing administrative remedies, the Commissioner's refusal to reopen his prior applications contravenes due process."); see also Udd v. Massanari, 245 F.3d at 1099 ("Where a claimant alleges that a prior determination should be reopened because he suffered from a mental impairment and was not represented by counsel<sup>[6]</sup> at the time of the denial of benefits, he has asserted a colorable constitutional claim."); Elchediak v. Heckler, 750 F.2d 892 (11<sup>th</sup> Cir. 1985) (noting that "plaintiff's contention that his mental illness precluded him from litigating his claim for disability benefits because it prevented him from proceeding in a timely fashion from one administrative level to the next raises a colorable constitutional claim").

### **Standard of Review**

Although the Court of Appeals for the First Circuit has not addressed the standard of review to be employed in a case such as this, other circuits have utilized the familiar substantial

---

<sup>6</sup> The Ninth Circuit in Udd v. Massanari, 245 F.3d 1096 (9<sup>th</sup> Cir. 2001), noted that "lack of representation by counsel is not required to state a colorable constitutional claim," id. at 1099 n.3.

evidence test. See Stieberger v. Apfel, 134 F.3d 37, 38 (2<sup>nd</sup> Cir. 1997) (noting, in case involving particularized claim of mental impairment preventing comprehension of SSA notice of administrative remedies, that "review is subject to the traditional substantial evidence test"); see also Evans v. Chater, 110 F.3d at 1484 (utilizing substantial evidence test in affirming decision that claimant was not so mentally impaired that denial of reopening prior applications contravened due process); Schrader v. Heckler, 754 F.2d 142, 144 (4<sup>th</sup> Cir. 1985) (utilizing substantial evidence test in finding that factual determination that claimant's mental condition was not such as to prevent, on due process grounds, application of res judicata to claim). This Court follows the Second, Fourth, and Ninth Circuits and finds that use of the substantial evidence test is appropriate.

Under that standard, the Court's role in reviewing the Commissioner's decision is limited. Brown v. Apfel, 71 F.Supp.2d 28, 30 (D.R.I. 1999). Although questions of law are reviewed *de novo*, the Commissioner's findings of fact, if supported by substantial evidence in the record,<sup>7</sup> are conclusive. Id. (citing 42 U.S.C. § 405(g)). The determination of substantiality is based upon an evaluation of the record as a whole. Id. (citing Irlanda Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1<sup>st</sup> Cir. 1991) ("We must uphold the [Commissioner's] findings ... if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion."))

---

<sup>7</sup> The Supreme Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)); see also Brown v. Apfel, 71 F.Supp.2d 28, 30 (D.R.I. 1999) (quoting Richardson v. Perales, 402 U.S. at 401, 91 S.Ct. at 1427).

(second alteration in original)). The Court does not reinterpret the evidence or otherwise substitute its own judgment for that of the Commissioner. Id. at 30-31 (citing Colon v. Sec'y of Health & Human Servs., 877 F.2d 148, 153 (1<sup>st</sup> Cir. 1989)). "Indeed, the resolution of conflicts in the evidence is for the Commissioner, not the courts." Id. at 31 (citing Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1<sup>st</sup> Cir. 1981) (citing Richardson v. Perales, 402 U.S. 389, 399, 91 S.Ct. 1420, 1426 (1971))).

### **Regulatory Framework**

An initial determination is binding unless a claimant requests reconsideration within the stated time period or the Social Security Administration ("SSA") revises the initial determination. See 20 C.F.R. § 404.905 (2009); see also 20 C.F.R. § 404.987 (2009) ("Generally, if you are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review and that determination or decision becomes final."). A claimant (or other party to the reconsideration) must file a written request for reconsideration within sixty days after receipt of notice of the initial determination. See 20 C.F.R. § 404.909(a) (2009). However,

[i]f you want a reconsideration of the initial determination but do not request one in time, you may ask us for more time to request a reconsideration. Your request for an extension of time must be in writing and must give the reasons why the request for reconsideration was not filed within the stated time period. If you show us that you had good cause for missing the deadline, we will extend the time period. To determine whether good cause exists, we use the standards explained in § 404.911.

20 C.F.R. § 404.909(b). Section 404.911 provides in relevant

part that:

(a) In determining whether you have shown that you had good cause for missing a deadline to request review we consider--

(1) What circumstances kept you from making the request on time;

(2) Whether our action misled you;

(3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and

(4) **Whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.**

....

20 C.F.R. § 404.911(a) (2009) (bold added).

A determination, revised determination, decision, or revised decision may be reopened--

(a) Within 12 months of the date of the notice of the initial determination, for any reason;

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989,<sup>[8]</sup> to reopen the case; or

(c) At any time if--

(1) It was obtained by fraud or similar fault ...;

---

<sup>8</sup> According to § 404.989:

(a) We will find that there is good cause to reopen a determination if--

(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made.

20 C.F.R. § 404.989 (2009).



....

(7) It finds that the claimant did not have insured status, but earnings were later credited to his or her earnings record to correct errors apparent on the face of the earnings record ... which would have given him or her insured status at the time of the determination or decision if the earnings had been credited to his or her earnings record at that time, and the evidence of these earnings was in our possession ... **at the time of the determination or decision;**

....

20 C.F.R. § 404.988 (2009) (bold added).

#### **ALJ's Decision**

ALJ Atkins made the following findings: that Plaintiff was the properly substituted party upon the death of Claimant; that the Appeals Council affirmed ALJ McGinn's decision as it pertained to Claimant's disability beginning on April 1, 1975, and remanded only for determination of Claimant's disability during the period from his alleged onset date of December 31, 1974, through March 31, 1975; that the record demonstrated that Claimant first met the disability insured requirements of the Act on April 1, 1975, and continued to meet them through June 30, 1975, and again met the requirements as of October 1, 1975, and continued to meet them through June 30, 1976; that Claimant was not disabled at any time prior to April 1, 1975, the date he was first insured for purposes of DIB;<sup>9</sup> that the initial determinations of the prior applications were not to be reopened

---

<sup>9</sup> Plaintiff does not challenge this finding. In fact, at the 3/30/06 hearing, Plaintiff's counsel agreed that the issue of Claimant's disability prior to April 1, 1975, was "legally irrelevant and moot, because he wasn't even first insured until after that point." (R. at 261) Accordingly, the Court finds that ALJ Atkins' finding that Claimant was not disabled at any time prior to April 1, 1975, based on the current application is supported by substantial evidence in the record and is legally correct.

or revised; that Claimant, through Plaintiff, his widow, had not established "good cause" for missing the deadline to request reconsideration of the initial determinations dated September 4, 1975, and July 11, 1978, pertaining to the prior applications; and that Claimant was entitled to a period of disability and DIB commencing on April 1, 1975, but not prior thereto because Claimant lacked disability insured status prior to that date. (R. at 24)

### **Errors Claimed**

Plaintiff argues that: (1) ALJ Atkins' finding that Claimant did not have "good cause" under Social Security Ruling ("SSR") 91-5p for missing the deadline for requesting reconsideration of the initial denials of his prior applications is not supported by substantial evidence; (2) ALJ Atkins' refusal to reopen Claimant's prior applications despite his mental illness violated his right to procedural due process; and (3) ALJ Atkins' refusal to reopen Claimant's prior applications based on defective notice(s) violated his right to procedural due process and SSR 95-1p.

### **Discussion**

#### **I. SSR 91-5p - Good Cause**

Citing SSR 91-5p, Plaintiff argues that ALJ Atkins' finding that Claimant did not have "good cause" for not timely requesting reconsideration of the 9/4/75 and 7/11/78 initial determinations is unsupported by substantial evidence in the record. See Memorandum in Support of Plaintiff's Motion for Relief under 42 U.S.C. § 405(g) and/or 28 U.S.C. § 1331 ("Plaintiff's Mem.") at 9, 11-13. Plaintiff contends that Claimant's "mental illness clearly meets the 'good cause' criteria." Id. at 10; see also id. at 11 ("[Claimant] maintains that a Listing level psychotic impairment constitutes good cause for his failure to appeal ... [and] that his mental impairment prevented him from understanding

and pursuing the procedures for requesting reconsideration of the September 1975 and/or July 1978 initial determinations.").

According to SSR 91-5p:

When a claimant presents evidence that mental incapacity prevented him or her from timely requesting review of an adverse determination ..., and the claimant had no one legally responsible for prosecuting the claim (e.g., a parent of a claimant who is a minor, legal guardian, attorney, or other legal representative) at the time of the prior administrative action, SSA will determine whether or not good cause exists for extending the time to request review. If the claimant satisfies the substantive criteria, the time limits in the reopening regulations do not apply; so that, regardless of how much time has passed since the prior administrative action, the claimant can establish good cause for extending the deadline to request review of that action.

**The claimant will have established mental incapacity for the purpose of establishing good cause when the evidence establishes that he or she lacked the mental capacity to understand the procedures for requesting review.**

In determining whether a claimant lacked the mental capacity to understand the procedures for requesting review, **the adjudicator must consider the following factors as they existed at the time of the prior administrative action:**

- inability to read or write;
- lack of facility with the English language;
- limited education;

**-any mental or physical condition which limits the claimant's ability to do things for him/herself.**

If the claimant is unrepresented and has one of the factors listed above, the adjudicator will assist the claimant in obtaining any relevant evidence. The decision as to what constitutes mental incapacity must be based on all the pertinent facts in a particular case. **The adjudicator will resolve any reasonable doubt in favor of the claimant.**

SSR 91-5p, 1991 WL 208067, at \*2 (S.S.A.) (bold added). "If the claimant establishes good cause for missing the deadline to request review, [SSA] process[es] the request for review in

accordance with established procedures and the prior administrative action is not final or binding for purposes of applying the rules on either res judicata or administrative finality." Id. at \*1.

ALJ Atkins found that Plaintiff's counsel's

broad argument that the mere fact that ALJ McGinn<sup>[10]</sup> and the U.S. Army<sup>[11]</sup> found the claimant to be disabled due to a severe mental impairment is insufficient to establish "good cause" for the claimant missing the deadline for filing a request for reconsideration relative to the initial determinations on his prior applications for [DIB] filed in 1975 and March 1978.<sup>[12]</sup> [Plaintiff] admitted at the hearing that during the 1970s, [claimant] was home alone, without a caretaker or guardian, while she was away working. There is no evidence in the record indicating that the claimant had been adjudicated by any court or similar body as being "mentally incompetent" at that time. In addition, there is no indication in the medical evidence of record which indicates the claimant had either a psychiatric hospitalization or any other exacerbation in his mental impairment at the times he would have received the initial determination denial notices on his prior applications for [DIB]. The claimant apparently had no problem filing not only one prior application, but, also, another prior application

---

<sup>10</sup> See (R. at 35-39).

<sup>11</sup> In a letter dated March 28, 2002, the Department of Veterans Affairs notified Claimant that he had been found to be 100% disabled due to bipolar disorder with post traumatic stress disorder and was entitled to service connected compensation effective September 17, 1998. (R. at 59-62); see also (R. at 63-71).

<sup>12</sup> At this point in his opinion ALJ Atkins included a footnote which stated:

The mere fact that the cla[i]mant was found to have a Listings level mental impairment (psychosis) does not necessarily mean that he was "mentally incompetent" and "lacked the mental capacity to understand the procedures for requesting review" relative to his failure to request a reconsideration after the initial determinations on the prior applications filed in "1975" and "March 1978."

(R. at 23 n.7) (internal citation omitted).

for [DIB] in the 1970's despite his mental impairment.<sup>[13]</sup> In fact, the claimant worked, though not at the substantial gainful activity level, during the alleged period of disability despite his mental illness. Indeed, the claimant did not transfer his power of attorney to his wife until 1996, an act which would require that the claimant be mentally competent at that point in time. Hence, this [ALJ] holds that the claimant (through his widow) has not established good cause for missing the deadline to request a reconsideration determination on either the initial determination dated September 4, 1975[,], or the initial determination dated July 11, 1978[,], relative to the claimant's prior applications for [DIB] filed in 1975 and March 1978.

(R. at 23) (footnotes and internal citations omitted).

Plaintiff challenges almost every point made by ALJ Atkins in rejecting her SSR 91-5p argument. First, as noted above, ALJ Atkins rejected Plaintiff's broad argument that the fact that both ALJ McGinn and the U.S. Army found Claimant to be disabled due to a severe mental impairment was sufficient to establish "good cause" for missing the deadline for filing a request for reconsideration of the initial determinations regarding his prior applications. (R. at 23) The Court finds that the ALJ was correct in doing so. ALJ McGinn's decision that Claimant met Listing 12.03 as of April 1, 1975, does not automatically mean that Claimant "lacked the mental capacity to understand the procedures for requesting review." SSR 91-5p, 1991 WL 208067, at \*1, 2; see also Devereaux v. Chater, No. 95-1196, 1996 WL 98956, at \*1, 4 (10<sup>th</sup> Cir. Mar. 7, 1996) (unpublished decision) (affirming ALJ's determination, which noted distinction between disability from employment and incompetency to pursue a claim for benefits, that plaintiff had mental competency to administer

---

<sup>13</sup> Plaintiff testified at the 3/30/06 hearing that she was aware that Claimant had filed the 1975 application, but could not remember whether she or "the company helped him apply for it." (R. at 270) She further testified that she had no knowledge regarding the 1978 application. (R. at 270-71)

claim); Torres v. Sec'y of Health, Educ. & Welfare, 475 F.2d 466, 468 (1<sup>st</sup> Cir. 1973) ("[T]he general finding of disability<sub>[,]</sub> made on evidence of both asthma and nerves, tells us merely that he was occupationally disabled within the meaning of the Act; one may be so disabled and yet retain the awareness and mental capacity to understand and pursue one's right."). Similarly, the fact that the United States Army found Claimant to be disabled based on his mental impairment does not require the SSA to do the same. See Cushman v. Soc. Sec. Admin., 175 Fed. Appx. 861, 862 (9<sup>th</sup> Cir. 2006) ("[A]lthough a VA disability rating does not necessarily compel the [SSA] to reach the same result, such rating must be given great weight."); (R. at 92) ("A finding by a private organization or government agency that a person is disabled does not necessarily mean that the person meets the disability requirements of the [Act]."). ALJ Atkins was clearly aware of Claimant's 100% disability rating by the VA, having questioned Plaintiff regarding same during the 3/30/06 hearing, (R. at 265-67), and acknowledged Plaintiff's argument regarding that disability rating in his decision, (R. at 21).

ALJ Atkins also noted that Plaintiff "admitted at the hearing that during the 1970s her husband was home alone, without a caretaker or guardian, while she was away working." (R. at 23); see also (R. at 265, 268, 271). Plaintiff also testified that during this period Claimant sometimes drove himself to doctor's appointments, (R. at 265), and that at one point Claimant was in control of the mail and bills, (R. at 271). SSR 91-5p directs the ALJ to consider factors relating to "any mental ... condition which limits the claimant's ability to do things for him/herself." SSR 91-5p, 1991 WL 208067, at \*2. While Plaintiff testified that "during the relevant time frame, [Claimant's] judgment about money and benefits was clouded by severe mental illness," Plaintiff's Mem. at 12, "[i]t is the

responsibility of the [Commissioner] to determine issues of credibility and to draw inferences from the record evidence," Irlanda Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1<sup>st</sup> Cir. 1991).

Plaintiff takes issue with ALJ Atkins' statements that "[t]here is no evidence in the record indicating that the claimant had been adjudicated by any court or similar body as being 'mentally incompetent' at that time," (R. at 23), and that "there is no indication in the medical evidence of record which indicates the claimant had either a psychiatric hospitalization or any other exacerbation in his mental impairment at the times he would have received the initial determination notices on his prior applications for [DIB]," (id.). Plaintiff complains that "ALJ Atkins apparently improperly required [Claimant] to have been adjudicated incompetent or to have transferred all decision-making authority to another person to prove that he could not understand the relevant initial determinations and the importance of appealing," Plaintiff's Mem. at 12-13,<sup>14</sup> and that "ALJ Atkins apparently required [Claimant] to prove that he was psychiatrically hospitalized at the time he would have received the initial determinations to show that he could not understand them," id. at 12. Plaintiff correctly states that there is no legal requirement that either of the above must have occurred. However, ALJ Atkins required no such thing. He simply considered Plaintiff's mental state and competence among other factors in reaching his determination that Plaintiff did not lack the mental capacity to understand the procedures for review. See SSR 91-5p,

---

<sup>14</sup> The ALJ also observed—and Plaintiff does not dispute—that Claimant did not transfer power of attorney to her until 1996, "an act which would require that the claimant be mentally competent at that time." (R. at 23); see also (R. at 268). Additionally, the record indicates that Claimant was found to be competent for VA purposes in 2002. (R. at 68)

1991 WL 208067, at \*1, 2; see also Evans v. Chater, 110 F.3d at 1484 (affirming ALJ's finding that claimant had not shown good cause under SSR 91-5p to reopen either of his two prior applications in part because of claimant "never having been diagnosed as incompetent"); Devereaux v. Chater, No. 95-1196, 1996 WL 98956, at \*3 (noting that "[t]here is no contemporaneous medical evidence demonstrating medical incompetence in 1975"); Matos v. Sec'y of Health, Educ. & Welfare, 581 F.2d 282, 287 (1<sup>st</sup> Cir. 1978) (noting that nothing in psychiatric report indicated that claimant was mentally unfit to pursue administrative remedies). But see Udd v. Massanari, 245 F.3d at 1100, 1101 (noting that claimant experienced crisis requiring hospitalization one week before termination of benefits).<sup>15</sup>

Plaintiff additionally challenges the ALJ's reliance on Plaintiff's ability to file "not only one prior application, but, also, another prior application for [DIB] in the 1970's despite his mental impairment," (R. at 23), stating that the "issue is not whether [Claimant] knew how to apply for benefits, but rather whether he understood how to appeal, the importance of appealing,

---

<sup>15</sup> The record reflects that Claimant was hospitalized six times at Butler Hospital ("Butler"). (R. at 213-40) His second hospitalization, from February 11, 1975, to March 12, 1975, (R. at 216-23), preceded his receipt of the 9/4/75 notice by almost six months. At the time of his discharge on March 12, 1975, a notation by Eliot Barron, M.D., indicated that Claimant "ha[d] been able to achieve a reasonably satisfactory remission." (R. at 216); see also (R. at 219). There is no evidence in the record that Claimant was hospitalized again until June 28, 1976. (R. at 224) He returned to Butler in December of 1976. (R. at 227-31)

Plaintiff was hospitalized at Butler again in May and June of 1978, (R. at 232-36), apparently because he was not taking his medication regularly, (R. at 234). On discharge June 16, 1978, it was noted that he had entered a remission but, after being taken off Haldol, became "mildly hypomaniac." (Id.) After being put back on a lower dose of Haldol, he was discharged to convalesce briefly at his parents' home. (Id.) He received the 7/11/78 notice approximately one month later. There is no indication in the record of another hospitalization until December of 1979. (R. at 237-40)



of seeking further administrative review of an initial denial of those benefits," Plaintiff's Mem. at 12. However, courts have considered such actions in determining whether a claimant lacked the mental capacity to understand the procedures for requesting review. See Matos v. Sec'y of Health, Educ. & Welfare, 581 F.2d at 287 ("[I]n 1968 her mental condition did not preclude her from filing her second claim."); see also Shrader v. Heckler, 754 F.2d 142, 144 (4<sup>th</sup> Cir. 1985) (noting record indicated that following denial of his third claim, plaintiff "properly and timely applied for administrative reconsideration of the denial" and concluding that this, among other factors, "[was] substantial evidence to support the Secretary's determination that [plaintiff] had the mental capacity to understand the hearing and appellate process incident to consideration of his claim"). It was reasonable for ALJ Atkins to infer from Claimant's ability to file two additional applications for DIB that he should have been able to understand the procedures for seeking review of the initial denials of the prior applications. See Irlanda Ortiz v. Sec'y of Health & Human Servs., 955 F.2d at 769 ("It is the responsibility of the [Commissioner] to ... draw inferences from the record evidence."). The ALJ also observed that Claimant worked subsequent to his alleged onset date, albeit not at the level of substantial gainful activity, despite his mental illness. (R. at 23)

Plaintiff's final argument pertaining to SSR 91-5p is that ALJ Atkins, contrary to the dictates of the ruling, "did not 'resolve any reasonable doubt in favor of the claimant.'" Plaintiff's Mem. at 12 (quoting SSR 91-5p, 1991 WL 208067, at \*2). However, Defendant notes that Plaintiff points to no "specific failure," Defendant's Memorandum of Law in Support of Motion for an Order Affirming the Decision of the Commissioner ("Defendant's Mem.") at 11, and there is no indication in ALJ

Atkins' opinion that he did not give Claimant the benefit of any reasonable doubt. This appears to be a situation in which Plaintiff simply disagrees with the result on remand, see Dvareckas v. Sec'y of Health & Human Servs., 804 F.2d at 772 (noting that "claimant's argument is simply that the first decision was wrong and should now be corrected even though the time for further review has long since passed"), and is, in effect, asking this Court to substitute its judgment for that of the Commissioner, see Colon v. Sec'y of Health & Human Servs., 877 F.2d at 152-53 ("With respect to a decision whether to reopen a prior final decision ... the district court simply has no authority to reweigh the evidence and substitute its judgment for that of the [Commissioner] in denying a request to reopen."); see also Rodriguez Pagan v. Sec'y of Health & Human Servs., 819 F.2d 1, 3 (1<sup>st</sup> Cir. 1987) ("We must affirm the [Commissioner's] resolution, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence."); Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1<sup>st</sup> Cir. 1981) ("We must uphold the [Commissioner's] findings in this case if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion.").

The Court finds that Plaintiff has not established that Claimant "lacked the mental capacity to understand the procedures for requesting review." SSR 91-5p, 1991 WL 208067, at \*1, 2, and, therefore, has not shown "good cause," id., for missing the deadline to request reconsideration of the initial denials of his prior applications. The Court further finds that ALJ Atkins' decision that the prior applications should not be reopened is supported by substantial evidence in the record and is legally correct. Accordingly, I do not recommend remand on Plaintiff's first claim of error.

## II. Procedural Due Process

Plaintiff asserts that Claimant had a property interest in his applications for DIB, that he had a right to procedural due process in his proceedings for DIB, and that he lacked the mental capacity to understand the significance of the September 1975 and July 1978 initial denials or to pursue his administrative remedies with respect thereto. Plaintiff's Mem. at 14. The Court has already addressed the last contention in connection with Plaintiff's SSR 91-5p argument.

"It is axiomatic that due process requires that a claimant receive meaningful notice and an opportunity to be heard before his claim for disability benefits may be denied." Udd v. Massanari, 245 F.3d at 1099 (citing Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893 (1976)) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); see also Goldberg v. Kelly, 397 U.S. 254, 267, 90 S.Ct. 1011 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard."). The Supreme Court has addressed the issue of due process requirements in the context of Social Security disability benefits:

**The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.** All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case.

Mathews v. Eldridge, 424 U.S. at 348-49 (bold added) (internal citations and quotation marks omitted); see also Richardson v. Perales, 402 U.S. 389, 402, 91 S.Ct. 1420 (1971) (noting that extent to which procedural due process must be afforded to recipient is influenced by the extent to which he may be "condemned to suffer grievous loss") (quoting Goldberg v. Kelly,

397 U.S. at 263; cf. Stieberger v. Apfel, 134 F.3d at 39 (noting that "several circuits have ruled that notice of administrative appellate time limits is constitutionally defective when received by a person too mentally ill to understand the notice" and citing cases); Boothby v. Soc. Sec. Admin. Comm'r, 1997 WL 727535, at \*1 (noting that argument that, because claimant's mental impairment prevented him from understanding and pursuing his administrative remedies and he lacked legal or other representation at the time, the refusal to reopen first application contravened due process "when factually supported, has gained a favorable judicial reception").

Deciding whether procedural due process has been denied in a given case involves two inquiries. First, the court must determine whether a life, liberty, or property interest is at stake. If the answer to the first question is "yes," the court must go on to decide what process is due.

Butland v. Bowen, 673 F.Supp. 638, 640 (D. Mass. 1987).

Here, Plaintiff argues that Claimant had a property interest in his application for DIB. Plaintiff's Mem. at 14. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701 (1972). The United States Supreme Court has yet to rule on the extent to which applicants for, as distinguished from recipients of, government benefits have property rights in their expectations. Butland v. Bowen, 673 F.Supp. at 640-41; accord Cushman v. Shinseki, No. 2008-7129, 2009 WL 2448505, at \*6 (Fed. Cir. Aug. 12, 2009) ("The Supreme Court has not ... resolved the specific question of whether applicants for benefits, who have not yet been adjudicated as entitled to them, possess a property interest

in those benefits." ). Other courts, however, have accorded due process rights to applicants for benefits. Butland v. Bowen, 673 F.Supp. at 641 (listing cases); see also Gonzalez v. Sullivan, 914 F.2d 1197, 1203 (9<sup>th</sup> Cir. 1990) ("An applicant for social security benefits has a property interest in those benefits."); Daniels v. Woodbury County, Iowa, 742 F.2d 1128, 1132 (8<sup>th</sup> Cir. 1984) (rejecting distinction between eligibility for and termination of benefits); Wright v. Califano, 587 F.2d 345, 354 (7<sup>th</sup> Cir. 1978) (declining to stress distinction between applicants for and recipients of Social Security benefits and stating that "denials do not necessarily deserve less due process than terminations"); Dealy v. Heckler, 616 F.Supp. 880, 886 (W.D. Mo. 1984) (finding that plaintiff "has, as a Social Security applicant, a sufficient claim of entitlement to Social Security benefits to trigger a protected property interest"); c.f. Cushman v. Shinseki, 2009 WL 2448505, at \*8 (finding that applicant for veteran's disability benefits had property interest protected by Due Process Clause); Raper v. Lucey, 488 F.2d 748, 752 (1<sup>st</sup> Cir. 1973) (finding that procedural due process applies to applicants for motor vehicle operator's license).

"A procedural due process violation ... is not complete 'when the deprivation occurs; it is not complete unless and until the State fails to provide due process.'" Kildare v. Saenz, 325 F.3d 1078, 1085 (9<sup>th</sup> Cir. 2003) (quoting Zinermon v. Burch, 494 U.S. 113, 125-26, 110 S.Ct. 975 (1990)); cf. Holbrook v. Pitt, 643 F.2d 1261, 1280 (7<sup>th</sup> Cir. 1981) ("Due process ... is a flexible concept that requires such procedural protections as the particular situation demands."). Assuming without deciding that Claimant (as an applicant for DIB) had a constitutionally

protected property interest in such potential benefits,<sup>16</sup> see Gipson v. Harris, 633 F.2d 120, 122 (8<sup>th</sup> Cir. 1980), the Court must next determine what process is due, see Butland v. Bowen, 673 F.Supp. at 640; see also Gonzalez v. Sullivan, 914 F.2d at 1203 ("Because appellant has a protected interest, this court must determine what process is due.") (citing Mathews v. Eldridge, 424 U.S. at 335). This inquiry generally requires consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

First, with respect to the private interest, clearly Plaintiff (on behalf of Claimant) has an interest in receiving the benefits to which she alleges Claimant is entitled based on the prior applications. See Howard v. Apfel, 17 F.Supp.2d 955, 970 (W.D. Mo. 1998) (noting that "[t]he private interest is both significant and obvious" because plaintiff had paid into the Social Security program for years and her financial condition was such that she needed the disability benefits); Butland v. Bowen, 673 F.Supp. at 641 ("[The] plaintiff's private interest is potentially great. She asserts that she has paid the proper amounts into the social security system; that she is permanently

---

<sup>16</sup> The Court bases this assumption on the Ninth Circuit's holding in Gonzalez v. Sullivan, 914 F.2d 1197, 1203 (9<sup>th</sup> Cir. 1990), the District of Massachusetts' holding in Butland v. Bowen, 673 F.Supp. 638, 641 (D. Mass. 1987), and the fact that the First Circuit in Raper v. Lucey, 488 F.2d 748 (1<sup>st</sup> Cir. 1973), concluded that procedural due process applied to procedures governing applications for motor vehicle operator's licenses, see id. at 752.

disabled due to multiple sclerosis; and that she now needs her social security disability insurance proceeds in order to cover medical expenses."); Dealy v. Heckler, 616 F.Supp. at 886 ("The private interest involved is both significant and obvious. The plaintiff, who has paid into the Social Security program for many years, may be entitled to receive disability benefits. Moreover, plaintiff's current financial situation indicates a need for additional financial support."); cf. Holbrook v. Pitt, 643 F.2d at 1280 (noting that "the Supreme Court has recognized that 'the possible length of wrongful deprivation of ... benefits is an important factor in assessing the impact of official action on the private interests.'" (quoting Mathews v. Eldridge, 424 U.S. at 341) (alteration in original)). However, the significance of this factor is diminished by the fact that the Court has already found that good cause has not been shown for reopening the 1975 application or the 1978 application. See Discussion section I. supra at 18; see also Passopulos v. Sullivan, 976 F.2d 642, 648 (11<sup>th</sup> Cir. 1992) ("The ALJ was not required to go back and consider [plaintiff's] claims of physical impairment individually because, as previously noted, the ALJ had determined that [plaintiff] had not shown good cause for reopening the 1982 final decision.").

Second, as to the risk of erroneous deprivations and probable value of additional or substitute procedural safeguards, the risk of erroneous deprivation is high. Howard v. Apfel, 17 F.Supp.2d at 970; see also id. ("[T]here is not just a mere possibility that plaintiff would be awarded benefits. She was awarded disability benefits."); cf. Ford v. Shalala, 87 F.Supp.2d 163, 181 (E.D.N.Y. 1999) ("The magnitude of the risk of error ... is revealed by consideration of the effect they inevitably have on the proper functioning of those processes designed by the agency for the very purpose of correcting error. Absent basic

information with respect to the factual and legal premises for agency action, claimants cannot evaluate whether an appeal is warranted much less make that determination in the short time given them to preserve their appeal rights."). Although "no significant financial<sup>[17]</sup> or administrative burden is associated with the requirement that the government provide plaintiff with correct information," Butland v. Bowen, 673 F.Supp. at 641 (citing Dealy v. Heckler, 616 F.Supp. at 880, 886); see also id. at 642 (noting that plaintiff's second denial should not have been accorded finality because the plaintiff was not informed about the res judicata consequences of abandoning the action),<sup>18</sup> the SSA has already recognized the need to avoid providing misleading information, see SSR 95-1p, 1995 WL 259487, at \*2 (S.S.A.). However, as will be discussed in the next section, see Discussion section III. infra at 29-30, ALJ Atkins determined that SSR 95-1p did not apply in the instant matter, and the Court finds no reason to reverse that determination.

---

<sup>17</sup> The Court notes, as did ALJ Atkins, (R. at 21 n.5), that "the potential 'costs' of this case to the [G]overnment is in no way a consideration in deciding this case," (id.); cf. Ford v. Shalala, 87 F.Supp.2d 163, 182 (E.D.N.Y. 1999) ("Governmental interest in preserving the public fisc and conserving administrative resources is 'not overriding' in the welfare context.").

<sup>18</sup> The Court notes that res judicata is not at issue here because ALJ McGinn found that:

[I]n view of the fact that the prior files cannot be located a decision cannot be made as to whether the previous adverse determinations involved the same facts and issues; the initial determination dated September 4, 1975, is erroneous on its face as it indicated that the claimant did not have disability insured status; and in view of the fact that the claimant's impairment(s) is mental and those determinations were made prior to the publication of the revised mental impairment Regulations on August 28, 1985, issued in response to the Disability Benefits Reform Act of 1984, res judicata is precluded.

(R. at 38)



Third, regarding the Government's interest, clearly the Government has an interest in administrative finality of determinations pertaining to claims for benefits. See Califano v. Sanders, 430 U.S. at 108 (noting congressional policy choice in § 205(g), 42 U.S.C. § 405(g), which was "obviously designed to forestall repetitive or belated litigation of stale eligibility claims"); see also Young v. Bowen, 858 F.2d at 955 ("In the context of social security law, both res judicata and administrative finality accomplish one similar task—they prevent reexamination of the merits of an administrative decision."); Matos v. Sec'y of Health, Educ. & Welfare, 581 F.2d at 286 (noting, in case where claimant argued that time limits for reopening claim for DI should not apply to mentally disabled person, that allowing judicial review of res judicata determinations "would have the effect of disturbing the finality of decisions ... from which the claimant originally could have made a timely appeal if he had pursued all his remedies"). "A claim of constitutionally defective notice, even in the context of a claim for disability benefits based on mental illness, cannot involve federal court jurisdiction merely upon a generalized allegation, long after the fact, that the claimant was too confused to understand available administrative remedies." Stieberger v. Apfel, 134 F.3d at 41.

Moreover, this Court finds the Fourth Circuit's holding in Long v. Chater, No. 94-2343, 1995 WL 234291, at \*1 (4<sup>th</sup> Cir. 1995) (unpublished decision), to be persuasive. The Fourth Circuit found that:

[T]he district court correctly dismissed [the plaintiff's] complaint for lack of subject matter jurisdiction. The Secretary's denial of her request to reopen a prior denied claim is plainly not subject to judicial review. To the extent [the plaintiff] argues that the Secretary's denial violated her due process rights, we find this contention without merit because the

Secretary satisfied the requirements of the Due Process Clause by conducting a supplemental hearing and making findings concentrating [the plaintiff's] mental capacity in 1985.

Long v. Chater, 1995 WL 234291, at \*1; see also Young v. Bowen, 858 F.2d 951, 955 (4<sup>th</sup> Cir. 1988) (noting that once plaintiff had presented prima facie proof that mental illness prevented her from understanding the procedure necessary to appeal the denial of her prior pro se claim, Secretary could not decline to reconsider claim "unless he first conducted an evidentiary hearing"); Dealy v. Heckler, 616 F.Supp. at 887 (finding notice given to plaintiff to be constitutionally deficient and ordering that Secretary "afford the plaintiff a full, fair and complete administrative hearing on the plaintiff's second application without regard to the decision made with respect to the first application"). Such is the case here. Plaintiff, on behalf of Claimant, has already received a supplemental hearing on her claim that the 1975 notice and the 1978 notice were deficient and violated Claimant's right to due process and that, therefore, the prior applications should be reopened. The Appeals Council remanded specifically for an adjudication of Claimant's alleged disability prior to April 1, 1975. (R. at 41) At the supplemental hearing, Plaintiff's attorney took the opportunity "to pursue a whole new issue . . .," (R. at 261), namely whether the prior applications should be reopened. ALJ Atkins addressed that issue. No further process is due.<sup>19</sup> See Kildare v. Saenz, 325 F.3d at 1085 (noting that procedural due process violation is

---

<sup>19</sup> At least one court has found that "[n]o constitutional violation will have occurred if substantial evidence supports the ALJ's decision at the 91-5p hearing." Evans v. Chater, 110 F.3d 1480, 1483 (9<sup>th</sup> Cir. 1997). Here, the Court has found that substantial evidence supports the ALJ's decision that Plaintiff has not shown good cause for Claimant's failure to meet the deadline for requesting reconsideration of the initial denials of his prior applications. See Discussion section I. supra at 18-19.

not complete "unless and until the State fails to provide due process").

The Court finds that no due process violation occurred. Accordingly, the Court does not recommend remand on Plaintiff's procedural due process claim.

### **III. SSR 95-1p - Defective notice(s)**

Plaintiff additionally contends that ALJ Atkins' refusal to reopen the September 4, 1975, and July 11, 1978, initial determinations violated Plaintiff's procedural due process right to notice of the consequences of not seeking further administrative review of an initial denial. See Plaintiff's Mem. at 15 (citing SSR 95-1p, 1995 WL 259487 (S.S.A.)). According to Plaintiff, because the notices of the denials were defective, Claimant had good cause for not timely seeking reconsideration of those denials and is entitled to DIB based on either or both of his prior applications. See id. at 17.

SSR 95-1p provides in relevant part that:

A notice is covered by this Ruling if it advised the claimant that if he or she did not request administrative review, he or she still had the right to file a new application at any time without further explaining that filing a new application instead of a request for administrative review could result in the loss of benefits.

1. Initial Determination Notice Containing The Following Sentence:

**"If you did not request reconsideration of your case within the prescribed time period, you still have the right to file another application at any time."**

....

Absent evidence to the contrary, SSA will presume that any notice of an initial or reconsideration determination denying a claim for [DIB] is covered by this Ruling if it was dated after August 31, 1977, and prior to March 1, 1990.

In all other situations (e.g., notices ... dated prior to

September 1, 1977, ... ) the claimant must furnish a copy of the notice covered by this Ruling, or SSA's records must show that a notice covered by this Ruling was issued to the claimant.

SSR 95-1p, 1995 WL 259487, at \*2-3. The Ruling additionally states that:

Under this Ruling, the Agency will find that a claimant has demonstrated that the failure to file a timely request for administrative review was the result of a notice covered by this Ruling if he or she provides an acceptable explanation, based on all the pertinent facts in a particular case, **linking his or her failure to file a timely request for administrative review to the absence in the notice of a statement that filing a new application instead of a request for administrative review could result in the loss of benefits.**

In making this determination, factors which an adjudicator may consider include, but are not limited to, the following:

- the claimant's explanation of what he or she thought the notice meant and how that understanding influenced his or her actions;
- the claimant's mental condition;**
- the claimant's educational level;
- the claimant's ability to speak and understand the English language;
- how much time elapsed before the claimant filed a subsequent claim or sought administrative review of the prior determination; and
- whether the claimant was represented by a non-attorney. Normally, representation by an attorney at the time of receipt of the notice bars a claimant from relief under this Ruling.

Id. at \*3-4 (bold added); see also id. at \*2 ("SSA will make a finding of good cause for late filing of a request for administrative review ... if a claimant received a notice covered by this Ruling and **demonstrates that, as a result of the notice, he or she did not timely request such review. The mere receipt of a notice covered by this Ruling will not, by itself, establish good cause.**") (bold added).

ALJ Atkins found that "SSR 95-1p is not applicable in the instant case since ... the claimant's widow asserts that he did not file a timely request for review due to his psychosis (as opposed to being misled by a defective notice) and the only initial determination notice dated September 4, 1975<sub>[,]</sub> which is contained in the record is dated before the period identified for these defective notices." (R. at 23 n.10) The 9/4/75 notice, which Claimant received before the relevant time period, does not contain the required sentence.<sup>20</sup> (R. at 52) The 7/11/78 notice, which falls within the relevant period, is not in the record, although it is presumptively covered by SSR 95-1p. See SSR 95-1p, 1995 WL 259487, at \*3.

ALJ Atkins' reason for finding SSR 95-1p inapplicable, however, is valid. At the 3/30/06 hearing, Plaintiff's attorney questioned Plaintiff as follows:

Q In your opinion, was your husband incapable, **due to his mental illness**, of really understanding and appreciating the Social Security application --

---

<sup>20</sup> As noted previously, see Facts and Travel supra at 2 n.2, the 9/4/75 notice of denial at the initial determination stage was erroneous in that Plaintiff did, in fact, have insured status at that time. However, as ALJ Atkins observed:

[T]here is no evidence of record which shows that either of the initial determinations on the prior applications for [DIB] were erroneous on the face of the evidence considered therein "**at that time**" since, ... particularly with respect to the initial determination dated September 4, 1975<sub>[,]</sub> which erroneously denied the claim for lack of insured status, the [SSA] would not have had the claimant's earnings for the years 1975 and 1976 "**at that time**," which subsequently gave him insured status, due to the lag time involved in posting the claimant's earnings (20 CFR [§] 404.988(c)(8)).

(R. at 22); see also Adames v. Califano, 552 F.2d 1, 2 (1<sup>st</sup> Cir. 1977) (affirming ALJ's decision that reopening a prior decision to correct a concededly erroneous omission of a critical quarter of coverage was barred); 20 C.F.R. § 404.988(c)(7), (8).

A Oh.

Q -- process, the denials, the importance of the denials, the need to appeal? Could he comprehend any of that, in your opinion?

A No. My husband didn't even go for Workers' Comp when he left work. He could have done that. He had no idea what he was doing.

(R. at 272) (bold added). Counsel did not question Plaintiff regarding the allegedly defective notices. In fact, in her closing argument, Plaintiff's attorney characterized the issue of the notices as "just frosting on the cake." (R. at 279)

Moreover, Plaintiff has offered no evidence "linking [Claimant's] failure to file a timely request for administrative review to the absence in the notice of a statement that filing a new application instead of a request for administrative review could result in the loss of benefits." SSR 95-1p, 1995 WL 259487, at \*3. On the contrary, as ALJ Atkins noted, (R. at 23 n.10), Plaintiff testified that Claimant's failure to comprehend the need to appeal the initial determination was due to his mental illness, (R. at 272).

Accordingly, the Court concludes that Plaintiff's SSR 95-1p argument is without merit. I therefore do not recommend remand on this issue.

### **Summary**

In summary, the Court finds: that ALJ Atkins' determination that Plaintiff had not shown "good cause" for failing to timely request reconsideration is supported by substantial evidence in the record and is legally correct; that ALJ Atkins' refusal to reopen Claimant's prior applications did not violate his right to due process; and that ALJ Atkins' conclusion that SSR 95-1p was inapplicable is supported by substantial evidence and is legally correct. The Court further finds that ALJ Atkins' decision that

Claimant was not disabled at any time prior to April 1, 1975, is supported by substantial evidence in the record and is legally correct. Accordingly, Plaintiff's claims of error should be rejected.

### **Conclusion**

Based on the foregoing, I recommend that Defendant's Motion to Affirm be granted and that Plaintiff's Motion to Reverse be denied. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1<sup>st</sup> Cir. 1980).

/s/ David L. Martin  
DAVID L. MARTIN  
United States Magistrate Judge  
September 25, 2009